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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 792

HILTON HOTELS CORPORATION, ALLEGHENY HOTEL CORPORATION, SHERATON MID-CONTINENT CORPORATION,
Petitioners,

v.

ROBERT C. WEAVER, Administrator of the Housing and Home Finance Agency, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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Dated March 4, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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SUMMARY OF ARGUMENT

Respondent concedes that the question presented is important to more than 200 urban American communities. Further, the decision of the court below, denying standing to petitioners to enforce a procedure in-

serted into the Housing Act for their benefit, conflicts with the Second Circuit decision in *Gart* v. *Cole*, 263 F. 2d 244 (2d Cir.), *cert. denied*, 359 U.S. 978 (1959). Respondent concedes that the enactment of § 106(g) was a direct legislative response to *Taft Hotel Corp.* v. *HHFA*, 262 F. 2d 307 (2d Cir. 1958), *cert. denied*, 359 U.S. 967 (1959). Accordingly, the *Taft* case no longer reflects the law on standing. The issue presented is of widespread importance and involves a conflict between Circuit Courts. It requires review by this Court.

ARGUMENT

1. Respondent concedes that the question presented is important to more than 200 urban American communities. Petitioners contended that the same problem regarding hotel construction exists in most of the 600 urban renewal projects which had been approved, but not completed prior to the enactment of § 106(g). (Petition, pp. 13-16) This estimate, while admittedly subject to some correction, was based on the HHFA's own published reports. Respondent's entire answer is to state that the problem presented does not exist in *all* of these projects but only in *some* of them. Respondent asserts that a random HHFA survey made by them of 5 states revealed that *only* 37 percent of the urban renewal plans sampled contain a form of incidental authorization for hotel construction such as appears in the Pittsburgh plan in this case. Applied on a nationwide basis this would mean that over *200* urban renewal plans contain such provisions. Surely a question which involves over 200 urban American communities is not *de minimis*. Thus, even accepting respondent's figure, the issue remains of major importance.

2. As indicated in the Petition, the decision below conflicts with *Gart* v. *Cole*, 263 F. 2d 244, 250 (2d Cir.), *cert. denied*, 359 U.S. 978 (1959), which holds that those for whose benefit a procedure was inserted in the Housing Act do have standing to seek judicial enforcement of that procedure.

Contrary to respondent's statement[1] petitioners have not asked the Court to determine the *substantive* question under the statute, that is, whether or not there "exists in the area a need for additional units of [transient] housing." Rather, petitioners seek a declaration that respondent is bound to obey the *procedure* set forth by Congress in the statute and *procure a survey of need* prior to authorizing the construction of the now proposed hotel. Both *Gart* and the instant case concern the question of a party's standing to seek enforcement of *procedural* rights inserted in the Housing Act for his protection. The decision of the Second Circuit in *Gart* and the decision of the court below are squarely in conflict.

3. Respondent's citation of *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940), is inapposite, for there the Court determined that the statute allegedly infringed by a government agency, did not confer standing on the plaintiffs because it had not been passed for the benefit of the plaintiffs. As the Court stated:

> "Section 3709 of the Revised Statutes requires . . . *for the Government's benefit* that its contracts be

[1] "More fundamentally, the complaint in *Gart* went to the manner in which the Administrator reached his decision, while here the underlying argument is that satisfaction of substantive criteria relating to need was a prerequisite to any approval." (Respondent's Brief, pp. 10-11) As shown above, *both* situations, of course, involve a *procedure* to be followed by respondent.

made after public advertising. It was *not* enacted for the protection of sellers and confers no enforceable rights upon prospective bidders." (Emphasis supplied. 310 U.S. at 126).

The instant case is to the contrary for it cannot be denied that § 106(g) was a positive expression of Congressional concern for hotels in the *Taft* situation and was passed specifically to protect existing hotels.

This is not a situation, as in the old cases cited by respondent, where the complaint merely charges economic loss "through competition made possible by federal aid," and where Congress has expressed no concern for the complainants.[2] Here, Congress has clearly announced that competition with existing hotels shall not be created with government subsidies, unless a specific procedure is followed and there is a precise demonstration of conditions of need. That procedure was inserted in the law to protect hotels. It has been arbitrarily disregarded by respondent in this case.

4. Respondent concedes that the enactment of § 106 (g) was a direct legislative response to *Taft Hotel Corp.* v. *HHFA*, 262 F. 2d 307 (2d Cir. 1958), *cert. denied*, 359 U.S. 967 (1959), wherein the owner of an existing hotel was denied standing to challenge HHFA irregularities in the authorization of a hotel for an urban renewal project. Nevertheless, respondent contends illogically that the addition of § 106(g) did nothing to change the law of the *Taft* case, and asserts that in the absence of express authority in § 106(g) petitioners are still to be denied standing to sue.

Of course § 106(g) changed the law. The entire legislative history of § 106(g) reflects Congress' intent

[2] Respondent's Brief, p. 8.

further to protect hotels from the unlawful competition of subsidized, unneeded hotels by restricting urban renewal projects, as other government assisted housing programs, to the creation of "sound permanent housing for *residential* use."[3] Where, as in § 106(g), the statute is silent as to standing but the intent and purpose of the legislation is clear, standing is properly to be inferred:

> "Implied rights of action are not contingent upon statutory language which affirmatively indicates that they are intended. On the contrary, they are implied unless the legislation evidences a contrary intention." *Brown* v. *Bullock*, 194 F. Supp. 207, 224 (S.D.N.Y.), *affirmed*, 294 F. 2d 415 (2d Cir. 1961).[4]

5. Respondent's construction of the "plain wording" of the statute as applying only to "the *inclusion* of *provisions* in urban renewal plans" is, to say the least, unduly literal. It completely overlooks the fact that

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[3] H.R. Rep. No. 2359 of the House Committee on Banking and Currency on S. 4035, the Housing Act of 1958, 85th Cong., 2d Sess., 33, 40 (1958). (Emphasis in Original) See Petition, pp. 17-20.

[4] "Increasingly, the tendency in the federal courts has been to infer private rights of action from federal statutes unless to do so would defeat manifest congressional purpose. See, e.g., *Texas & Pac. R. Co.* v. *Rigsby*, 241 U.S. 33; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210; *Neiswonger* v. *Good-Year Tire & Rubber Co.*, D.C., 35 F. 2d 761; *Reitmeister* v. *Reitmeister*, 2 Cir., 162 F. 2d 691; *Fitzgerald* v. *Pan American World Airways*, 2 Cir., 229 F. 2d 499; *Roosevelt Field, Inc.* v. *Town of North Hempstead*, D.C., 200 F. Supp. 360". (*Wheeldin* v. *Wheeler*, 373 U.S. 647 at 662 (1963), dissenting opinion).

[5] As Justice Frankfurter observed: "One would suppose that this particular theory of statutory construction had had its brains knocked out. . . ." (*Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U.S. 128, 138 (1956) dissenting opinion). Moreover,

the statute was aimed at urban renewal, not at provisions for urban renewal. The unrealistic construction of the statute proposed by respondent should be rejected. As this Court has stated, it will avoid such rituals of statutory construction and

> "will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." (*SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344 at 350-51 (1943))

6. Respondent is mistaken in his second point. Retroactivity in the application of § 106(g) is not in issue. To the contrary, the statute was intended to apply prospectively and remedially to *all future* hotel construction in urban renewal areas. Congress clearly intended that § 106(g) "would make it necessary for a survey to be made before a new hotel could be built in an urban renewal area."[6] Section 106(g) was enacted in 1959. The hotel now in issue was not proposed until 1960, and was not begun at least as late as the filing of the opinion of the court below. No problem of retroactivity lies in the application of § 106(g) to this hotel, and no more delay should be tolerated in applying this remedial provision to all newly proposed hotels in urban renewal projects.

Judge Learned Hand has warned against restricting the meaning of a statute to the meaning of its "plain words": "There is no surer way to misread any document than to read it literally." (*Guiseppi* v. *Walling*, 144 F. 2d 608, 624 (2d Cir. 1944), *aff'd* 324 U.S. 244 (1945)).

[6] 105 Cong. Rec. 8815 (May 21, 1959). See Petition, pp. 17-20.

CONCLUSION

For the foregoing reasons and those stated in the Petition, a writ of certiorari should be granted.

Respectfully submitted.

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